84-1537 (1)

Office-Supreme Court, U.S.
FILED
MAR 29 1985
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

EDUCATIONAL BOOKS, INC.

Petitioner

vs.

COMMONWEALTH OF VIRGINIA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

THOMAS J. MORRIS
2060 North 14th Street
Arlington, Virginia 22201
(703) 524-1900
Attorney for Petitioner

26 pp

QUESTION PRESENTED

CAN THE POSSESSION OF TEN FILMS SUPPORT TEN SEPARATE CONVICTIONS UNDER A STATUTE PROSCRIBING POSSESSION WITH INTENT TO RENT ANY OBSCENE ITEMS CONSISTENT WITH THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY?

TABLE OF CONTENTS

	Page
Question Presented	i
Index of Authorities	iii,iv
Opinion Below	1
Statement of Jurisdiction	2
Constitutional Provision and Statute Involved	2
Statement of the Case	4
Reasons for Granting the Writ	5
Conclusion	19
Appendix	
"A" Opinion of the Virginia Supreme Court	21

INDEX OF AUTHORITIES

	Page
UNITED STATES CONSTITUTION, Fifth Amendment	2,4
CODE OF VIRGINIA, (1950 As Amended) §18.2-374.4	3,7

Cases:

BELL v U.S., 349 U.S. 81, S.Ct. 620, 99 L.Bd 905 (1955)	17
BLOCKBURGER v U.S., 284, U.S. 299, 525 Ct 180, 76 L.Bd 306 (1932)	6,7,16,18
BROWN v OHIO, 432 U.S. 161 (1977)	9
BROWN v U.S., 623 F.2d 54 (9th Cir.1980)	17
COMM. v ALEXANDER, 20 S.E. 782	7,9,12
COMM. v BELGRAVE, 391 A2d 662 (1978)	13
COMM. v BUSER, 419 A2d, 1233 (1980)	13
COMM. v COX, 209 Pa. Super. 457, 228 A2d 30	14
COMM. v COX, 209 Pa. Super---(1967) allocutur refused	14
COMM. v CROKER, 421 A.2d 818 (1980)	13
COMM. v JACKSON, 412 A.2d 610 (1929)	13
COMM. v LEZINSKY, 264 Pa. Super. 476, 400 A.2d 184 (1979)	14
COMM ex rel. SHADDOCK v ASHE, 340 Pa. 286, 17 A.2d 190 (1940)	14,15

Index cont'd

	Page
COMM. v WALKER, 468 Pa. 323, 362 A.2d 227 (1976).....	14
COUSINS v STATE, 354 A.2d 825.....	6
GAVIERES v U.S., 220 U.S. 338, 31 S.Ct. 421, 55 L.Ed. 489 (1911).....	7
HOLLY'S CASE, 113 Va. 769, 75 S.E.88, (1912).....	5
JONES v COMM., 218 Va. 18 (1977).....	5
PANDELLI v U.S., 635 F.2d 533 at 539 (6th Cir 1980).....	19
SIMPSON v U.S., 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed. 2d 70 (1978).....	16,17
THOMAS v WARDEN, #81-6753, U.S. 4th Crt. Ct. Appls.....	15
TURNER v COMM., 221 Va. 513.....	12
U.S. v BARRINGTON, 662, F.2d 1046, (4th Cir. 1981).....	19
U.S. v LEWIS, 662 F.2d 1087 (4th Cir. 1981).....	11
U.S. v MASON and BURGESS, 611 F.2d 49 (4th Cir. 1979).....10,11,12	
WHALEN v U.S., 100 S.Ct. 1432 (1980)..	19
22 C.J.S. §285, Fa. 31.50 and 31.55...	5

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EDUCATIONAL BOOKS, INC.

Petitioner

vs.

COMMONWEALTH OF VIRGINIA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

COMES NOW the Petitioner, Educational Books, Inc., by counsel, and prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia entered in the above-entitled cause on the 29th day of January 1985.

OPINION BELOW

By letter dated the 29th day of January

1985, the Virginia Supreme Court denied the Petitioner's Petition for Appeal. A copy of the letter is appended hereto as Appendix A.

STATEMENT OF JURISDICTION

The final Order denying the Petitioner's Petition for Appeal was entered by the Supreme Court of Virginia on the 29th day of January 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the and or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy

of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 18.2-374(4), Code of Virginia, 1950, as amended, provides:

It shall be unlawful for any person knowingly to:

(4) Have in his possession with intent to sell, rent, lend, transport, or distribute any obscene item. Possession in public or in a public place of any obscene item as defined in this article shall be deemed prima facie evidence of a violation of this section.

STATEMENT OF THE CASE

On August 17, 1983, an investigator with the Fairfax County Police Department, visited

the premises of the Petitioner, Educational Books, Inc., in Fairfax County, Virginia, and viewed ten (10) films in projection booths located within the store. On the basis of that visit, a search warrant was issued and executed the same day. The ten films that the investigator viewed were seized and the Petitioner was subsequently indicted for ten (10) counts of knowingly possessing an obscene item with the intent to rent in violation of §18.2-374(4) of the Code of Virginia, 1950, as amended.

On December 7, 1983, the Petitioner was tried before a jury and convicted on all ten counts. The jury imposed the maximum fine on each count. The trial court denied the petitioner's post-trial motions and imposed the jury verdict.

REASONS FOR GRANTING THE WRIT

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall for the same offense be put twice in jeopardy of life or limb. This fundamental principle does not permit a

single crime to be subdivided into two (2) or more offenses and a series of charges may not be based on the same act. (See 22 C.J.S. §285, fn 31.50 and 31.55). In Virginia and elsewhere, the "same evidence" test is the standard for determining whether different offenses are deemed the same for double jeopardy purposes. To determine whether two offenses are different, the test is whether one offense requires proof of an additional fact, which the other does not, even though each offense may arise from the same transaction and some of the acts may be necessary to prove both. See Jones v Commonwealth, 218 Va 18, 235 S.E. 2d 313 (1977).

In Holly's Case, 113 Va 769, 772, 75 S.E. 88, 89 (1912), quoted in Jones, supra, at p.761, the Court stated:

> The theft of several articles at one and the same time constitutes an indivisible offense, and a conviction or acquittal of any one or more of them is a bar to a subsequent prosecution for the larceny of

the others.

The analytical test established by the United States Supreme Court in the case of Blockburger v United Staes, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) is dispositive:

> When the same act or transaction constitutes a violation of two distinct statutory provisions. The test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. 284 U.S. at 304 (emphasis added)

Similarly, the issue was recently addressed by the Maryland Supreme Court in the case of Cousins v State, 354 A.2d 825, where the Court stated:

> If each offense requires proof of a fact which the other does not, neither multiple prosecutions nor multiple punishments are barred by the prohibition against double jeopardy even though each offense may arise from the same act or

> criminal episode. Only where one offense requires proof of a fact not required by the other, or where neither offense requires proof of an additional fact, are the offenses deemed the same for double jeopardy purposes, with successive prosecutions, and multiple punishments being prohibited [citing Blockburger, supra, and Garieres v United States, 220 U.S. 338 (1911).]

If this test is not satisfied, if the offenses charged are revealed by it to be "only one", double jeopardy results from the prosecution or successive prosecutions.

In the case at bar, the Defendant was prosecuted under Section 18.2-374.4 of the Code of Virginia, 1950, as amended. That section makes it unlawful for any person to knowingly:

Have in his possession with intent to sell, rent, lend, transport, or distribute any obscene item. As far back as 1894, the Supreme Court of Virginia in Commonwealth vs Alexander, 20 S.E. 782, stated:

The authorities are abundant in support of the contention of the attorney general that where several articles of property are stolen at the same time and place though the stolen goods belong to different persons, the stealing is regarded as one transaction, and therefore as one offense, which may be charged in a single count. Hence, whether in a case like the present, the indictment is double, depends upon whether it charges more than one larceny or taking, and not on the number of articles taken, or their ownership. Lord Hale lays it down that if the accused at the same time steals goods from A to the value of sixpence, goods of B to the value of sixpence, and goods of C to the value of sixpence, being perchance in one bundle, or upon a table, or in one shop, this is grand larceny at common law, because it is one entire felony, done at the same time, though the persons had several

> properties, and therefore, in one indictment, they make grand larceny.(emphasis added)

Applying the Alexander rationale to this case, it is clear that the possession is the crux of the offense, and not the number of items that could be possessed. Assuming that it is the content of the film that renders it obscene, each frame could arguably be held to be an "obscene item" within the contemplation of the statutory prohibition. The fact that they were all "perchance in a bundle" i.e., one roll of film, or in several bundles, i.e., several rolls of film, is of no consequence, the arbitrary division of the crime into several separate offense cannot be tolerated under the Fifty Amendment as stated by the United States Supreme Court in Brown v Ohio, supra, in 1977:

> The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple crime into a series of temporal or spacial

units.

The Fourth Circuit Court of Appeals has discussed the "multiple charge but single transaction" situation in two recent cases. In United States v Mason and Burgess, 611 F.2d 49 (4th Cir. 1979), the court looked to Congressional intent to determine the "allowable unit of prosecution" when thre is simultaneous receipt by a convicted felon of multiple weapons and simultaneous execution of multiple forms by the felons in connection with the acquisition of the weapons.

Since the "definative unit of prosecution" could not be determined by the language of the sttute or its legislative history, the Court followed prior United States Supreme Court decisions requiring that any ambiguity must be resolved in favor of the accused. Therefore, the Court held that the simultaneous receipts of multiple weapons by the defendant can only be treated as one offense, and that the simultaneous execution of multiple forms during the acquisition of those weapons can also only be

treated as one offense. The multiple convictions were set aside.

The Mason decision, supra, was recently followed by the Fourth Circuit Court of Appeals in the case of United States v Lewis, 662 F.2d 1087 (4th Cir. 1981), arising from the United States District Court for the Eastern District of Virginia at Alexandria. The Court held that the federal kidnapping statute created a single crime with four jurisdictional bases, not four separate and distinct crimes. Consequently, the Defendant's conviction based upon the same acts under the separate count with a different jurisdictional basis (i.e., "Kidnapping within special maritime or territorial jurisdiction of the United States) was set aside.

Applying these principles to the case at bar, a close scrutiny of the involved statute reveals no legislative intent in regard to the use of the term "item". Indeed, the use of the term was probably employed to cover all types of materials rather than to single out each individual item. Similarly, the statute re-

veals no intent to require more than "one unit of prosecution" per possession. Since the legislative intent on this issue is not clearly established, the Courts have consistently required that doubt or ambiguity be resolved in the favor of the accused. Alexander, supra; Mason, supra; and Lewis, supra. Therefore, nine of the ten convictions involved here should be reversed on the ground that the indictment is duplicitous.

Another function of the double jeopardy protection is to ensure that multiple punishments are not imposed for the same offense. Turner v Commonwealth, 221 Va 513, 273 S.E. 2d 36, at 529. Even if this Court rules that the defendant can be constitutionally convicted on each of the ten separate counts this "merger of sentences doctrine" would prevent this defendant from being sentenced on any more than one count that characterizes the various separate "possession". The "merger of sentences doctrine" is concerned not with conviction, but with punishment. As was stated by Judge

Spaeth, in Commonwealth v Crocker, 421 A.2d 818 at 820 (1980), for the Superior Court of Pennsylvania:

> "...The merger of sentences doctrine is concerned not with conviction but punishment; its purpose is preclude the imposition of separate punishments for what in practical effect was but a single criminal act. Thus, in merger of sentences cases, we focus not only on the similarity of the elements of the crimes but also, and primarily, on the facts proved at trial, for the question is whether those facts how that in practical criminal act, in which case there will be merger and only a single sentence may be imposed, or more than a single act, in which case there will be no merger and a sentence may be imposed for each act. See Commonwealth v. Buser, 419 A.2d 1233, 1236-1237 (1980); Commonwealth v. Jackson, 412 A.2d 610, 613 n.8 (1979); Commonwealth v. Belgrave, 391 A.2d 662, 567 (1978) (CERCONE, P.J., concurring an

dissenting)("unique facts"). If there has been but one criminal act, even though it caused several injuries still there has been but one crime, for which there may be but one penalty. See Commonwealth v. Walker, 468 Pa. 323, 331, 362 A.2d 227, 231 (1976). Similarily, if there have been several acts but all were part of a single transaction and differed, if at all, only in degree, there may be but one penalty. Commonwealth ex rel. Shaddock v. Ashe, 340 a. 286, 288, 17 A.2d 190 (1940). See Commonwealth v. Cox, 209 Pa. Super. 457, 228 A.2d 30, allocatur refused, 209 Pa. Super. ----- (1967)(acts of kissing victim and fondling her breasts part of single criminal act of intercourse). Thus, in Commonwealth v. Lezinsky, 264 Pa. Super. 476, 400 A.2d 184 (1979), this court en banc held that the defendant's conviction of criminal mischief merged for sentencing purposes with his conviction of arson.

In so holding, Judge Van der Voort cited the decisions in Shaddock and Walker and stated:

'In our present case, although there were various consequences to various victims, the consequences derived from a single "act" or "transaction", specifically the ignition of the barn, which may be the basis of various charges, but ultimately of only one sentence.'"

Where a multiple-punishment-for-single-offense claim of double jeopardy is made, the first inquiry is whether as a matter of legislative intent there are single or multiple offenses. As stated by the Fourth Circuit, this approach requires the court to determine whether the legislature intended that 'an arguably single or continuous criminal episode could result in multiple units of prosecution based upon particular factors of time or other circumstances dividing the whole into discrete parts'. See Thomas vs Warden, #81-6753, U.S. 4th Cir. Ct.Appls, pg.4. This approach was

applied in Simpson vs United States, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed. 2d 70 (1978), wherein the Supreme Court held that only a single sentence was permitted following conviction under the Federal Bank Robbery Statute and the Firearms Statute. The use of the firearm occurred in the course of the bank robberies. The Supreme Court proceeded upon the assumption that the Blockburger test had been met, i.e., that "each provision required proof of a fact which the other did not", yet found other indications of contrary congressional intent outweighed the Blockburger indicia. However, the court, in holding for the defendant, stated:

> "To construe the statute to allow additional sentence authorized by 'the firearms Statute' to be pyramided upon the sentence already enhanced under (the Bank/Robbery Statute) would violate the established rule of criminal statutes should be resolved in favor of lenity'. See 435 U.S. at 14, 198 S.Ct. at 913."

The Simpson court had simply followed its long-standing practice of construing applicable statutes to determine whether "pyramiding" of sentences be allowed where there was one continuous act. See Bell vs United States, 349 U.S. 81, 83, 75 S.Ct. 620, 622, 99 L.Ed. 905 (1955). The Supreme Court in Bell declined to permit more than a single punishment where the defendant was convicted under two counts for violation of the Mann Act. He had transported across state lines two different women, albeit on the same trip and in the same vehicle. The essence of the opinion is contained in the closing sentence:

> "...If Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses..."
> (emphasis added)

The Ninth Circuit Court of Appeals in Brown vs United States, 623 F.2d 54, (9th. Cir. 1980), stated "the rule of lenity" as follows:

"A Court may not impose consecutive sentences for a single transaction that violates more than one statutory provision or purpose unless Congress has clearly expressed its intent to make each violation within that single transaction a separate offense requiring separate punishment..." (emphasis added) 623 F.2d at 57.

All in all, the question this Court must decide is the following: If this Court finds that the defendant can be convicted of each of the ten counts under the Blockburger test, i.e., that each count requires proof of a fact which the other does not, then this Court must examine the obscenity statute to determine what the legislative intent was as to whether multiple punishments should be permitted when there was undisputably only one separate single transaction. Unless the legislative intent is clear that ten separate fines be imposed, the ambiguity should be resolved in

favor of lenity. See Whalen vs United States, 100 S.Ct. 1432, at 1439 (1980); United States vs Barrington, 662 F.2d 1046, at 1050 (4th Cir. 1981); Pandelli vs United States, 635 F.2d 533 at 539 (6th Cir. 1980).

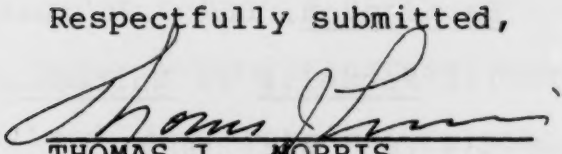
A close examination of the applicable Virginia statutes show no legislative intent to pyramid sentencing and punishment for each item possessed with the requisite intent in single transactions. The Defendant contends that at most, this Court can only impose the jury sentence to the maximum allowable fine for only one of the ten "possessions".

CONCLUSION

And in conclusion, the maximum conviction, based upon the trilogy of argument, may not exceed one conviction; and based upon the foregoing arguments and authorities, the petitioner prays that its Petition for Writ of Certiorari to the Supreme Court of Virginia be

granted.

Respectfully submitted,



THOMAS J. MORRIS
2060 North 14th Street
Arlington, Virginia 22201
Telephone: (703)524-1900
Attorney for Petitioner

Dated: March 25, 1985

CERTIFICATE OF SERVICE

It is hereby certified that service of this Petition has been made on Counsel for the Respondent by mailing copies thereof on this 28th day of March, 1985, in envelopes, with postage prepaid, properly addressed to them as follows:

Gerald L. Baliles, Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

Robert F. Horan, Commonwealth Attorney
Fairfax County Courthouse
4110 Chain Bridge Road, Suite 123
Fairfax, Virginia 22030

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 29th *day of* January, 1985.

Educational Books, Inc., Appellant,

against Record No. 840621
Circuit Court No. 40727

Commonwealth of Virginia, Appellee.

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By: Cynthia L McCoy
Deputy Clerk

BEST AVAILABLE COPY